CREDIT CORPORATION (M) BHD

v.

CHOO KAM SING & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[ORIGINATING MOTION NO: R3-25-135-97]
4 SEPTEMBER 1998

LABOUR LAW: *Employment - Redundancy - Proper test to be applied - When may an employee be dismissed by reason of redundancy - Employment Protection (Consolidation) Act 1978 of England, s. 81(2)*

LABOUR LAW: *Employment - Retrenchment - Retrenchment exercise to reduce costs resulting in dismissal of manager - Subsequent payment of non-contractual bonuses and salary increments to other employees - Whether reasonable - Whether a genuine retrenchment exercise scenario - Whether dismissal of manager without just cause or excuse*

LABOUR LAW: *Employment - Retrenchment - Redundancy - Whether employer ought to consult with employees before deciding on reduction in workforce - Code of Conduct for Industrial Harmony, arts 20 & 21*

LABOUR LAW: *Employment - Reinstatement - Employee reinstated following Industrial Court's order of reinstatement - Whether High Court ought to set aside order of reinstatement and order compensation instead - Whether to do so would be against equity and good conscience*

This was an application for *certiorari* to quash an award of the Industrial Court that held the first respondent's dismissal to be without just cause or excuse. The first respondent was awarded compensation and he was reinstated as the applicant's national sales manager.

In its letter of termination, the applicant stated that the termination of the first respondent's service was necessitated by reason of a reorganisation of the applicant which resulted in the first respondent's job function becoming redundant. The applicant's case was that reorganisation was conducted and implemented with a view to enhancing productivity and reducing costs. However, soon after the retrenchment exercise, the applicant's board of directors passed a resolution to pay bonuses and implement a new salary scheme.

Even if the court were to agree that the first respondent's dismissal was without just cause or excuse, the applicant urged the court to set aside the order of reinstatement and instead order the award to be sent back to the Industrial Court for compensation to be assessed. The ground relied on by the applicant was that since the position of the first respondent was abolished, reinstatement was no longer possible.

Held:

[1] The word 'redundant' is not defined in the Industrial Relations Act 1967. The Industrial Court in *Kesatuan Kakitangan Ladang-Ladang Seluruh Tanah Melayu v. Vemaladawi Namasivagam Ratnarajah* adopted the definition of redundancy as provided in s. 81(2) of the Employment Protection (Consolidation) Act 1978 of England which, this court opines, correctly represents the law. Contrary to that definition, the dismissal of the first respondent, based on the evidence, was not attributable wholly or mainly to the fact that the requirement of the applicant for the first respondent to carry out the work as the national sales manager had ceased or diminished.

[2] In a genuine retrenchment exercise scenario, no reasonable employer would pay out non-contractual performance bonuses and salary adjustments as was done in the instant case.

[3] Articles 20 and 21 of the code of conduct for Industrial Harmony on redundancy and retrenchment place certain burden on the employer before carrying out such an exercise. Although the code of conduct for Industrial Harmony has no legal force, it is a relevant factor for the purpose of considering the overall reasonableness of the employer's action in dismissal cases. In this regard, the Industrial Court was correct when it decided that one of the grounds for holding the dismissal to be without just cause or excuse was the fact there was no consultation with the first respondent before his dismissal. Therefore, the award was not perverse or unreasonable.

[4] The evidence before the Industrial Court showed that the first respondent's job functions were not abolished and in fact his duties were taken over by other employees. Thus, the order of reinstatement was justified. Further, as the first respondent had been reinstated in his former position one month after the award, it would not be right nor in accord with equity and good conscience for this court to interfere with the award of reinstatement and to order compensation instead.

[Application dismissed with costs.]

Case(s) referred to:

Credit Corporation (M) Bhd v. Rahima Muhamad & Anor [1998] 5 CLJ 181 ***(refd)***
ER Sutton v. Revlon Overseas Corporation Ltd [1973] 1 RLR 173 ***(dist)***
Kesatuan Kakitangan Ladang-ladang Seluruh Tanah Melayu v. Vemaladawi Namasivagam Ratnarajah [1991] 2 ILR 1234 ***(foll)***
Penang & Seberang Prai Textile & Government Industry Employees Union v. Dragon & Phoenix [1989] 1 MLJ 481 ***(refd)***
Said Dharmalingam v. Malayan Breweries (M) Sdn Bhd [1997] 1 CLJ 646 ***(refd)***
Sama Subur Sdn Bhd v. Kandasamy Athiappan [1991] 2 ILR 734 ***(refd)***
William Jacks & Co. (M) Sdn Bhd v. S. Balasingam [1997] 3 CLJ 235 ***(refd)***

Legislation referred to:

Employment Protection (Consolidation) Act 1978, s. 81(2)
Industrial Relations Act 1967, s. 20

For the applicant - R Abraham - M/s Shook Lin & Bok
For the respondent - P Kuppusamy; M/s P Kuppusamy & Co

Reported by S Dharmendran

JUDGMENT

Nik Hashim J:

This is an application by Credit Corporation (M) Bhd the applicant, for an order of *certiorari* to remove and quash Award No. 465 of 1997 dated 1 October 1997 by the Industrial Court, the 2nd respondent. The award was made pursuant to s. 20 of the Industrial Relations Act 1967 (the 'Act'), whereby Choo Kam Sing, the 1st respondent, claimed that he had been dismissed without just cause and excuse. The Industrial Court acceded to the claim.

The 1st respondent commenced employment with the applicant as a credit officer on 13 January 1977. At the time of retrenchment on 28 August 1992, the 1st respondent was holding the post of National Sales Manager, drawing a monthly salary of RM9,397. The applicant stated in the letter of termination dated 28 August 1992 (p. 45 of encl. 3) that the termination of the 1st respondent's service was necessitated by reason of a reorganisation of the applicant which resulted in the 1st respondent's job function within the company becoming redundant.

In his award, the learned Chairman of the Industrial Court at p. 19 of the award said:

> It is true that in examining the reason for reorganisation of the company (applicant) and the resulting termination of the claimant (1st Respondent) by reason of redundancy the Court does not conduct a detailed examination of the propriety of the scheme of reorganisation. It is also true that it is the right

of the employer to reorganise his business based on reasons of economy and better management of the business. The court is only concerned that such scheme is carried out *bona fide.*

To justify its action as *bona fide* the company (applicant) put forth its stand that the reorganisation was undertaken with the principal purpose of ensuring a cost efficient business necessitated by reason of the decline in profits for years 1990 to 1992 and the corresponding increase in staff costs over the period. However, the claimant (1st respondent) together with 8 other senior managers were selected as persons who should be retrenched on the basis that the company (applicant) was top heavy.

There is evidence from documents produced by the company (applicant) that for the years 1989 to 1993 the company (applicant) continued experiencing profit after taxation. COW-1 admitted that during the years 1991, 1992 and 1993 dividends were paid and the company (applicant) was top heavy as a result of the retention and redeployment of staff by the previous management. It is obvious the reorganisation was not for the sole purpose of ensuring cost-efficient business but more towards getting rid (of) senior managers who had been recruited under the previous management. The evidence of COW-1, taken as a whole, does not in my view, show the reorganisation was *bona fide.*

It is also noted in COW-1's testimony that the savings involved in retrenching all eleven senior executives would be saving a staff cost of RM783,289. per year. COW-1 admitted that the expenses incurred in implementing a new salary scheme and in paying bonuses would be approximately RM1.7 million.

Ultimately it is the finding of this Court that although the services of the claimant (1st respondent) were terminated for redundancy there was no pre-warning given to the claimant (1st respondent), no decrease in the activities in the department he was heading and the Claimant's (1st respondent's) duties were taken by managers who worked under him.

For the reasons given above, I find the dismissal of the claimant (1st respondent,) was without just cause or excuse.

The applicant is now seeking to quash the decision of the Industrial Court on eleven (11) grounds which the applicant claims come under the recognised grounds of irrationality and procedural impropriety. I propose to deal with them together.

Before me, Mr R Abraham, on behalf of the applicant, among other things, submitted that the job functions of the 1st respondent were already being effectively carried out by the respective managers prior to the termination of the 1st respondent, and therefore, there was clearly a surplus requirement within the meaning of the test in *William Jacks & Co. (M) Sdn Bhd v. S. Balasingam* [1997] 3 CLJ 235. In support of his submission, he cited an English National Industrial Relations Court of *E.R. Sutton v. Revlon Overseas*

Corporation Ltd [1973] 1 RLR 173, which concerned a chief accountant who was dismissed by his employers which resulted in the work previously carried out by him being split between three existing employees.

The central issue in this case is whether the 1st respondent is redundant.

The word 'redundant' has not been defined in our Act. In *Kesatuan Kakitangan Ladang-ladang Seluruh Tanah Melayu v. Vemaladawi a/p Namasivagam Ratnarajah* [1991] 2 ILR 1234, the Industrial Court made the following observations in relation to the term "redundancy" in Malaysian industrial law which, I agree with Mr R Abraham, correctly represents the law:

> Our Industrial Relations Act, 1967 does not define redundancy. However, s. 81(2) of the Employment Protection (Consolidation) Act 1978, of England, provides that:
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> > For the purpose of this Act, an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to:
> >
> > (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purpose of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or.
> >
> > (b) the fact that the requirements of the business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.
>
> A similar provision can be found in our Employment Act, 1955 that is ss. 12(3)(a), (b), (c) and (d). Further, this definition has been accepted and applied in our courts, in particular, the case of *Food Specialities (M) Sdn Bhd v. Esa bin Mohamed* [1989] 1 ILR 502 (Award No. 74/89)

Whereas on 'retrenchment', YA Gopal Sri Ram JCA in *William Jack, supra,* at p. 241 said:

> 'Retrenchment' has been defined as the discharge of surplus labour or staff by an employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action. Whether the retrenchment exercise in a particular case is *bona fide* or otherwise is a question of fact and of degree depending on the peculiar circumstances of the case. It is well settled that the employer is entitled to organise his business in the manner he considers best. So long as the managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of the case to determine whether the exercise of power is in fact *bona fide.*

Having taken into account all that has been said by counsel of both sides and having given the issue before me my most anxious consideration, I find the decision of the Industrial Court to be in accordance with law. The Industrial Court's finding that the 1st respondent's dismissal was without just cause or excuse is correct. Unlike *Sutton's* case, *supra*, the termination of service of the 1st respondent, based on the evidence available, was not attributable wholly or mainly to the fact that the requirement of the applicant for the 1st respondent to carry out the work as the National sales Manager had ceased or diminished. The following Industrial Court's findings will show that.

In the present case, the learned Chairman of the Industrial Court had investigated and scrutinised the facts before him and after considering COW1's evidence and the merit of the case in its totality, made a firm finding of fact that the reorganisation of the applicant was not *bona fide.* It was the applicant's case that reorganisation was conducted and implemented with a view to enhacing productivity and reducing costs. Yet soonest after the retrenchment with a view to enhancing productivity and reducing costs. Yet soon after the retrenchment exercise through which the applicant had hoped to save RM703,209, the applicant's board of directors at its meeting on 17 November 1992, passed a resolution to pay bonuses and implement a new salary scheme for all its employees and incurred RM1,752,257 for the purpose in 1992. COW1, the general manager of the applicant, had admitted in his testimony that during the years 1991, 1992 and 1993 dividends were paid and the applicant was top heavy as a result of the retention and redeployment of staff by the previous management. Hence, the finding of the learned chairman that 'it is obvious the reorganisation was not for the sole purpose of ensuring cost-efficient business but more towards getting rid (of) senior managers who had been **recruited** under the previous management'. I agree with MR P Kuppusamy that in a genuine retrenchment exercise scenario, no reasonable employer will pay out non-contractual performance bonuses and salary adjustments as was done in this case. Moreover, the learned chairman found as a fact that the 1st respondent was not given a pre-warning of the retrenchment as required under the Code of Conduct for Industrial Harmony (the code). Articles 20 and 21 of the code on redundancy and retrenchment put certain burden on the employer before carrying out the exercise.

> 20. In circumstances where redundancy is likely an employer should, in consultation with his employees' representatives or their trade union, as appropriate, and in consultation with the Ministry of Labour and Manpower, take positive steps to avert or minimise reduction of workforce by the adoption of appropriate measures such as:
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> (i) limitation on recruitment:
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> (ii) restriction of overtime work;

(iii) restriction of work on weekly day of rest;

(iv) reduction in number of shifts or days worked a week;

(v) reduction in the number of hours of work;

(vi) re-training and/or transfer to other department/work.

21. The ultimate responsibility for deciding on the size of the workforce must rest with the employer, but, before any decision or reduction is taken there should be consultation with the workers or their trade union representative on the reduction.

The above code was made on 9 February 1975, pursuant to a joint agreement by the Malaysian Council of Employers' Organisation and the Malaysian Trades Union Congress with the approval of the Minister of Labour and Manpower (as it was then known). It is noteworthy that s. 30(5A) of the Act, authorises the Industrial Court, in making an award to take into consideration, the requirement of the code. The importance to observe the code was emphasised by the Federal Court in *Said Dharmalingam v. Malayan Breweries (M) Sdn Bhd* [1997] 1 CLJ 646; [1997] 1 MLJ 352 which observed:

The reasonablenees of the dismissal may well depend on the procedure ...

Though the code has no legal force (*Penang & Seberang Prai Textile & Government Industry Employees Union v. Dragon & Phoenix* [1989] 1 MLJ 481), it is a relevant factor for the purpose of considering the overall reasonableness of the employer's action *(Said Dharmalingam, supra)* in dismissal cases. In this regard, the learned chairman is correct when he took into consideration the fact that there was no consultation held with the 1st respondent before his dismissal as one of the grounds that the dismissal was without just cause or excuse. On the whole therefore, the award is not perverse, neither is it unreasonable.

With regard to the award of reinstatements, MR R Abraham urged upon me to follow the approach taken by the Kuala Lumpur High Court O.M. No. R2-25-84-97 where the learned judge there set aside the order of reinstatement and instead ordered the award to be sent back to the Industrial Court for compensation to be assessed, on the grounds that 'the position of the 1st respondent was abolished, there were no such position now and no reinstatement is possible now' (see affidavit lanjutan Low Siak Wei of 24 April 1998 at p. 8). It is instructive to note that in O.M. No. R2-25-84-97, the application for an order of *certiorari* to quash the award that the dismissal was without just cause or excuse, was refused by the High Court. Unfortunately, the learned judge in that case did not give his reasons for setting aside the order of reinstatement and remitting the award for determination of compensation by the Industrial Court. Without the benefit of His Lordship's

grounds of decision, I regret I would not be able to follow the approach taken in that case. In the present case, the learned chairman of the Industrial Court ordered the 1st respondent to be reinstated to his former position after finding that his dismissal was without just cause or excuse. The 1st respondent prayed for reinstatement and he got it. It is significant to note that the evidence before the Industrial Court shows that the 1st respondent's job functions were not abolished and in fact his duties were taken over by other employees. In my view, the order of reinstatement is justified. The applicant has no choice but to comply with the order so granted. In the case of *Workman of Assam Match Co. Ltd v. The Presiding Officer, Labour Court, Assam & Ano*r (cited in *Sama Subur Sdn Bhd v. Kandasamy a/l Athiappan @ Kelvin* [1991] 2 ILR 734), a judgment of the Supreme Court of India, the Chief Justice Gajendragadkar J, said:

> It is well established that where in an industrial dispute arising out of a dismissal of a workman, it is established that the impugned dismissal was unjustified, the normal rule is that the dismissed workman should be reinstated. One of the objects which industrial adjudication has to keep in mind is to assure industrial employees security of tenure.

As the 1st respondent has been reinstated and employed by the applicant since one month of the date of award *ie*, 1 October 1997, I think it is not right and not in accord with equity and good conscience for this court to interfere with the award of reinstatement and to order compensation instead.

It is worthy of note that *certiorari* is only a discretionary remedy, exercisable at the discretion of the High Court. In *certiorari* proceedings, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction.

In the instance case, I find that the Industrial Court in arriving at its decision had not exceeded its jurisdiction. The reasons given by the Industrial Court for the decision it reached were not erroneous. It asked itself the right question, it took into account relevant facts and that it excluded from its purview all irrelevant considerations. I am satisfied that there is no miscarriage of justice in this case. Since the ultimate decision is correct, there is no justification for this court to interfere with the award.